2005

State of Utah v. Calvin Moore : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs. Case No. 20050072-CA

CALVIN MOORE,

Defendant/Appellant.

AMENDED BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR AGGRAVATED BURGLARY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-203 (WEST 2004), AND AGGRAVATED ASSAULT, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-103(1)(a) (WEST 2004), IN THE THIRD JUDICIAL DISTRICT COURT IN UTAH COUNTY, STATE OF UTAH, THE HONORABLE WILLIAM W. BARRETT PRESIDING

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STATE OF UTAH, **Plaintiff/Appellee,** **vs.** **CALVIN MOORE,** **Defendant/Appellant.**	**Case No. 20050072-CA**

AMENDED BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Defendant appeals a conviction for aggravated burglary, a first degree felony, in violation of Utah Code Ann. § 76-6-203 (West 2004), and aggravated assault, a second degree felony, in violation of Utah Code Ann. § 76-5-103 (West 2004), in the Third Judicial District Court in Utah County, State of Utah, the Honorable William W. Barrett presiding. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (West 2004).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

Issue 1: Did the performance of defendant's trial counsel fall below an objective standard of reasonableness and was defendant prejudiced?

Standard of Review: A claim of ineffective assistance of counsel raised for the first time on appeal is reviewed for correctness. *State v. Diaz*, 2002 UT App 288, ¶ 13, 55 P.3d 1131, *cert. denied*, 63 P.3d 104 (2003).

Issue 2: Did the trial court err in not *sua sponte* providing defendant with new counsel or granting an extension of time to file a motion for a new trial?

Standard of Review: These claims are unpreserved and are therefore reviewed for plain error. *State v. Dunn,* 850 P.2d 1201, 1208-09 (Utah 1993).

Issue 3: Did the trial court err in instructing the jury that it could convict defendant of both aggravated burglary and aggravated assault when, according to defendant, the crimes should have merged?

Standard of Review: No standard of review applies because defendant agreed to the jury instructions and any error is therefore invited. *See, e.g., State v. Lee*, 2006 UT 5, ¶16, --- P.3d --- (when error is invited, party has no right to appellate review).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes are relevant to this appeal and reproduced in Addendum A:

Utah Code Ann. § 76-6-202 (West 2004) (burglary)

Utah Code Ann. § 76-6-203 (West 2004) (aggravated burglary)

Utah Code Ann. § 76-5-103 (West 2004) (aggravated assault)

Utah Code Ann. § 76-1-402 (West 2004) (merger)

STATEMENT OF THE CASE

Defendant was originally charged by information with aggravated burglary, mayhem, and four counts of aggravated assault. R. 2-3. The State moved to dismiss the mayhem charge and stipulated to dismissal of one of the aggravated assault counts during a preliminary hearing on August 19, 2003. R. 33. Defendant was bound over on the remaining counts. *Id.*

Defendant was convicted of aggravated assault and aggravated burglary following a jury trial on November 23 & 24, 2004. R. 249-51, 296-97, 350, 351.[1]

The trial court sentenced defendant to consecutive terms of five years to life on the aggravated burglary charge and one to 15 years on aggravated assault. R. 314.

Defendant's trial counsel withdrew after defendant expressed a desire to raise a claim of ineffective assistance of counsel. R. 316-18.

Defendant timely appealed. R. 321.

On appeal, defendant filed a motion for remand to the trial court under rule 23B, Utah Rules of Appellate Procedure, for findings on his claim of ineffective assistance of counsel. This Court denied that motion on August 22, 2005, in part because his "vague assertions of dissatisfaction do not establish that he was entitled to new counsel." Order Denying Remand, dated August 22, 2005.

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[1] The State filed an Amended Information on November 23, 2004, charging defendant with two counts of aggravated assault and one count of aggravated burglary. R. 247-48. Defendant was acquitted of one count of aggravated assault. R. 298.

In conjunction with the filing of its Opposition Brief, the State filed a Motion to Strike Extra-Record Information from Appellant's Opening Brief. Pursuant to the State's motion, this Court ordered defendant to file an amended brief without "references to documents not included in the record on appeal. . ." Order, dated February 6, 2006, Addendum D.

Defendant filed his amended brief ("Amd. Aplt. Br.") on March 8, 2006, redacting most but not all references to extra-record material.

STATEMENT OF FACTS

Antoinette Jones: "I heard him laugh and then he said he just shot Marcus."

Before defendant kicked down the door to her apartment, struck her in the face with a pistol and shot her boyfriend, Antoinette Jones was having a nice evening. With her two children asleep in a back room, Jones had been enjoying an intimate evening at home with her live-in boyfriend, Marcus Anderson. R. 350:70-71, 78. But defendant changed all that.

About 2:30 or 3 a.m. on February 5, 2003, Jones and Anderson heard a knock at the door. R. 350:73. She looked through the peephole and saw the defendant and two men. R. 350: 73, 93. She recognized defendant because he was her sister's husband's cousin and had visited her home. R. 350:97-98. She also knew him socially through drug use. R. 350:74. The other men she knew only by their street names of "Little Wil" and "Mikey." R. 350:95.

She and Anderson did not want to open the door, so they hid in the shower. R. 350:75. Defendant kept pounding. Anderson told Jones not to answer, but she told him: "He's not going to go away if we don't answer it." *Id.*

She opened the door a crack to tell defendant they were asleep and to come back later. *Id.* He told her to "open the fucking door." R. 350:76.

"[T]hat's when I looked on the side of him and I seen the gun in his hand," she recalled. *Id.*

She closed the door, but defendant started kicking it. R.350:76. She tried to get to the door to her boys' room to tell them not to come out. R. 350:77. Before she could do that, the door flew open and defendant burst into the room. He immediately approached Jones and struck her in the face with the gun, injuring her cheekbone and eye. R.350:78.

Defendant then noticed Anderson in the adjoining living room and pointed the gun at him. *Id.* Jones looked to the two men accompanying defendant, one of whom had tears in his eyes and mouthed a single word: "Run." R.350:81. She did. R. 350:79-80.

She first ran to her landlord's apartment. No one answered. R. 350:81. She went downstairs to an apartment where she knew her sister, Bernice O'Neal Spillers, was staying with her husband, David Spillers. *Id.*[2] She rang the doorbell and while waiting for an answer, she heard a voice from upstairs say, "Put your head up." She heard a gunshot just as her sister opened the door. *Id.*

Jones entered the apartment, grabbed a cell phone and hid in the closet where she called 911. R. 350:82. Soon, she heard defendant outside asking if she was inside. She heard her sister say: "No. What happened?" *Id.*

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[2] David Spillers is also defendant's cousin. R. 350:127.

"I heard him [defendant] laugh and then he said he just shot Marcus," Jones testified. R. 350:83.

Bernice O'Neal Spillers: "[H]e said, [']I just shot that nigger Marcus[']."

Bernice O'Neal testified that her sister was scared and crying when she entered the apartment. R. 350:129.

"She said she wanted the phone, that Calvin had just came and kicked her door in and had hit her with the gun upside her face or in her face by her eye," O'Neal said. " . . . I remember her eye was messed up." *Id.*

The two of them heard the gunshot upstairs and Jones hid in the closet. Moments later, O'Neal heard the doorbell ring. R. 350:130.

"And it was him [defendant], and he said he was just coming by to let us know that he was leaving town. And we was like, [']Right now?[']. And he was like [']Yeah.[']. And we asked why, and he said, [']I just shot that nigger Marcus[']." R. 350:130.

After defendant left, O'Neal ran up to her sister's apartment where she found the door kicked in. R. 350:131. She saw blood, but could not see anyone. Her nephews came out of their bedroom and she told them their mom was safe. Anderson then came out of hiding and told her he had gotten shot in the hand, which she could see was bleeding. *Id.*

Marcus Anderson: "I asked him not to shoot me in the foot. . ."

Anderson described defendant as a "friend of a friend" and said the two occasionally used drugs together. R. 350:146. He also said that defendant was a drug dealer who

occasionally "fronted" drugs to Anderson on credit. In fact, he said he owed defendant $30 for drugs and he surmised that was the reason defendant confronted him. R. 350:159, 163-64

Anderson said that after Jones fled the apartment, defendant approached him and said: "I should shoot you in the foot." R. 350:149.

"I asked him not to shoot me in the foot so he asked me to put my hand up," Anderson recalled. R. 350:150.

Defendant then shot him in the hand from about two inches away. R. 350:150-51. Investigators later found a bullet hole in the wall with blood and bone fragments around it. R. 350:113-14.

Defendant: "I was home at the time."

Although he acknowledged that he knew all three eyewitnesses—O'Neal since 1996, Jones and Anderson for about three months—defendant flatly denied he committed the crimes or that he was anywhere near Jones' apartment early on February 5, 2003. R. 351:191-93.

"I was at home at the time," he testified. "I got home about 1:15, 1:20, somewhere about that area . . . Got into an argument with my wife because she was—she assumed I was cheating when I wasn't . . . I called for a ride, my ride came, and I left." R. 351:193.

Defendant claimed Jenna West, a friend, picked him up and dropped him off at the home of another friend, Tuan Jones, where he spent the night. R. 351:193, 197. He said his wife called him a few days later and told him the police had contacted her and were saying he was involved in an aggravated burglary at Jones' house. R. 351:194.

Lora Moore, defendant's wife, corroborated part of his testimony. She said that he came home late and she accused him of cheating on her. R. 350:120. She threw a glass of water on him and also threw his clothes around. R. 350:122. He left about 1:30 or 2 a.m., but she did not see him leave with anyone. R. 350:121.

Jenna West could not be located until the eve of trial when a State's investigator contacted her in Florida, where she was on "an extended family trip." R. 350:6. She told the State's investigator that she was unwilling to testify because she was not with defendant on the date in question and she refused to take the stand and lie for him. R. 350:6-7. Ultimately, West did not testify, but the State and defendant stipulated to what her testimony would have been and agreed to have it read into the record:

> Jenna West is a friend of Calvin Moore. She has on occasion associated with the defendant. She recalls on one occasion she was called by the defendant sometime after midnight to pick him up because he had a fight with his wife. She does not remember the date or month, but that it was in the wintertime. She dropped him off several hours later.

R. 351:207.

SUMMARY OF ARGUMENT

Point I: Defendant's trial counsel was not ineffective. First, because the evidence against defendant was so overwhelming, defendant's burden to demonstrate prejudice is extremely heavy and defendant has not met that burden. Second, defendant has not demonstrated deficient performance or prejudice for any of the specific claims of ineffectiveness he raises. Accordingly, his claims of ineffective assistance of counsel fail.

Point II: The trial court did not err in not *sua sponte* appointing new counsel or granting defendant additional time to file a motion for a new trial. The court granted trial counsel's motion to withdraw within days after the motion was filed and promptly appointed substitute counsel. The trial court did not err in not granting defendant additional time to file a motion for a new trial because no motion was ever filed and defendant had additional time after his counsel withdrew to file the motion himself or obtain substitute counsel. In any event, a new trial motion was without merit and would not have been granted. Therefore, even if the trial court should have granted additional time, the error was harmless.

Point III: *Defendant was properly convicted of both aggravated burglary and* aggravated assault. Under the facts of this case, the two crimes do not merge and the trial court did not err in giving the jury instructions allowing them to convict him of both charges.

ARGUMENT

I. DEFENDANT HAS FAILED TO DEMONSTRATE HIS TRIAL COUNSEL'S REPRESENTATION FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS.[3]

Defendant claims his counsel was ineffective for (1) not presenting witnesses favorable to the defense; (2) not objecting to the admission of "prejudicial" evidence; and

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[3] This section of the State's brief responds to point IV of the appellant's amended brief.

(3) not exposing the biases of two of the victims. *See* Amd. Aplt. Br at. 18-20. These claims fail.

To demonstrate ineffective assistance of counsel, defendant must establish that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To meet the performance prong, defendant must show counsel's "representation fell below an objective standard of reasonableness." *Id.* at 688, 690. To do so, he must overcome the strong presumption that counsel provided constitutionally effective performance. *Id.* at 689-91; *see also State v. Litherland*, 2000 UT 76, ¶19, 12 P.3d 92 (to establish ineffective assistance of counsel, defendant must "rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy") (citation and quotation omitted). To establish that such serious errors occurred, defendant must identify counsel's specific acts or omissions that "fall outside the wide range of professionally competent assistance." *State v. Classon*, 935 P.2d 524, 532 (Utah App.) (citations omitted and internal quotation marks omitted), cert. denied, 945 P.2d 1118 (1997). "'[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.'" *State v. Penman*, 964 P.2d 1157, 1162 (Utah App. 1998) (citing *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993)) (brackets in original).

Furthermore, it is not enough for petitioner to show that counsel's performance ***could have*** been better. The Sixth Amendment entitles petitioner "only to effective assistance of counsel, not to the best or most complete representation available." *State v. Tyler*, 850 P.2d

1250, 1259 (Utah 1993). The court may find counsel's performance constitutionally deficient only if petitioner establishes that counsel's performance was "completely unreasonable, not merely wrong." *Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999), *cert. denied*, 528 U.S. 1167 (2000). Even the best criminal defense attorneys may disagree on the way to defend a particular client. *State v. Orr*, 940 P.2d 42 (1997). To prevail on a claim of ineffective assistance, appellant must demonstrate "'that counsel's actions were not conscious trial strategy,'" and "that there was a 'lack of any conceivable tactical basis' for counsel's actions." *State v. Winward*, 941 P.2d 627, 635 (Utah App. 1997) (quoting *State v. Ellifritz*, 835 P.2d 170, 174 (Utah. App. 1992))

To meet his burden under the second, prejudice prong of the *Strickland* test, petitioner must show that he was actually harmed by any alleged deficiencies. Petitioner must demonstrate that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Dunn*, 850 P.2d at 1225. The courts have defined a reasonable probability as "a probability sufficient to undermine confidence in the outcome." S*trickland*, 466 U.S. at 694.

Defendant cannot demonstrate deficient performance or prejudice. Accordingly, his ineffective assistance claims fail.

A. Because the Evidence Against Him Was Overwhelming, Defendant's Burden To Show Prejudice Is Extremely High.

In the following sections, the State will demonstrate specifically that defendant's claims of ineffective assistance of counsel cannot succeed because defendant has failed to

show deficient performance or prejudice. As a preliminary matter, however, it should be noted that even assuming counsel performed deficiently, defendant's burden to demonstrate prejudice from any of counsel's alleged errors is extremely high because the evidence against him was overwhelming. Antoinette Jones and Marcus Anderson—both of whom could readily identify defendant because he had been a guest in their home as well as a companion in drug use—testified that defendant showed up on their doorstep at 2 or 3 a.m. and demanded to be let in. R. 350:73-76, 143-45, 147. They also testified that when they refused, defendant kicked down the door, entered and immediately struck Jones in the face with handgun. R. 350:76, 78, 143-44, 147-48. Anderson testified that defendant then threatened to shoot him in the foot, but finally shot him in the hand instead. R. 350:149-51. Afterward, defendant went downstairs to the apartment of his cousin, David Spillers, and admitted that he had just shot Anderson. R. 350:83, 130.

This testimony, which was contradicted only by defendant's unsubstantiated alibi, created a virtually insurmountable obstacle for defendant. As shown below, he has not met his burden to overcome the formidable evidence against him.

B. Trial Counsel Properly Investigated the Case and Presented Testimony from Defendant's Alleged "Alibi" Witness.

Defendant claims that his trial counsel was ineffective for not ensuring that "an important alibi witness" was available to testify for the defense. Amd. Aplt. Br. at 18. He also claims that trial counsel "similarly didn't attempt to identify the two eyewitnesses at the scene of the crime." Amd. Aplt. Br. at 20. These claims fail.

At trial, defendant testified that during the time the burglary and assault occurred, he was with a friend, Jenna West, who had picked him up at his home and dropped him off at another friend's house, where he spent the night. R. 351:193, 197. West did not testify, but the State and defendant stipulated to what her testimony would have been and the judge read it into the record:

> Jenna West is a friend of Calvin Moore. She has on occasion associated with the defendant. She recalls on one occasion she was called by the defendant sometime after midnight to pick him up because he had a fight with his wife. She does not remember the date or month, but that it was in the wintertime. She dropped him off several hours later.

R. 351:207.

Defendant claims his trial counsel was ineffective for not having West testify in person. Defendant does not acknowledge, however, that West was uncooperative and that she claimed she was not with defendant the night of the burglary and assault and did not want to perjure herself. R. 350:6-7. Nor does he acknowledge that his trial counsel went to great lengths to locate West and procure her testimony. A year before trial, the defense had located West and listed her name and address on a witness list. R. 118-21. Defense investigators spoke with her early in the case and she stated that she remembered picking defendant up one night after he had a fight with his wife, but she did not remember the date. R. 350:7-8. Trial counsel said he spoke with her a "couple of times" before trial. R. 350:8. The trial court rescheduled a trial date in June 2004 when West could not be located. R. 230. As the new trial date approached in November 2004, defense counsel was unable to locate West and became concerned that she was avoiding service of a subpoena by not answering

her door or telephone. R.243-46. In an effort to secure her attendance at trial, defense counsel obtained a material witness warrant for her arrest. R. 245. Immediately before trial, investigators for both the State and the defense attempted to locate West to arrange for her testimony. Finally, on the eve of trial, she was located in Florida where she was on an "extended family trip." R. 350:6. She told the State's investigator that she was unwilling to testify because she was not with defendant on the date in question and refused to take the stand and lie for him. R. 350:6-7.

Clearly, defendant's trial counsel understood the importance of West's testimony. He interviewed her, subpoenaed her and even tried to have her arrested. Defendant does not say what else he thinks should have been done and it is hard to imagine what other steps counsel could have taken. Defense counsel's performance was not deficient.

Nonetheless, assuming defendant's trial counsel was deficient in his efforts to procure West's testimony at trial—a rather far-fetched assumption—defendant still was not prejudiced given that the substance of her testimony was presented to the jury. Indeed, presenting her testimony by stipulation was better for defendant because if she had testified in person, her comment to the State's investigator—that she did not believe the night she

picked him up was the night of the burglary/assault—would surely have come out. R. 350:6-7. In sum, defendant suffered no prejudice from the lack of live testimony from West.[4]

C. Defendant's Trial Counsel Was Not Ineffective For Not Attempting to Exclude an Investigator's Summary of West's Testimony or Anderson's Testimony Concerning His Drug Debt to Defendant.

Defendant claims his trial counsel was ineffective for not attempting to exclude alleged hearsay testimony from a State investigator concerning the interview with West. Amd. Aplt. Br. at 19. He also claims that counsel should have attempted to exclude testimony by Anderson that defendant shot him because Anderson owed defendant $30 for drugs. *Id.* These claims are without merit.

Before the trial began, Sgt. Kevin Judd, an investigator for the Salt Lake County District Attorney's Office, testified about his efforts to contact West, the alleged alibi witness. R. 350:19, 21. Judd stated that he had contacted West on December 22, 2003, and that she said she did not want to testify because she was not with defendant the night the crimes occurred. R. 350:20. He also stated that West had called him the night before trial began. R. 350:24. She told him she was in Florida and would not be back in time to testify. *Id.* She also said "she was not with Calvin Moore on that night, she will not come in and lie for Calvin Moore, she told Kevin Kurumada [defendant's trial counsel] or whoever the

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[4]Defendant also claims that counsel was deficient for not investigating and identifying the two men who the victims said accompanied defendant during the commission of the burglary and assault. Amd. Aplt. Br. at 20. However, these men were never identified by their real names and defendant provides nothing to suggest it was even possible to identify or locate them.

attorney was four months ago that she would not testify and lie for Calvin Moore." R. 350:25.

Defendant claims this testimony is hearsay and should have been excluded. Amd. Aplt. Br. at 19. But defendant neglects to mention that this testimony was held outside the presence of the jury. Thus, trial counsel was not ineffective for not attempting to exclude Judd's testimony because it was never admitted at trial.

Defendant also claims that Anderson's testimony concerning his $30 drug debt was prejudicial and should not have been admitted under rules 402 and 403, Utah Rules of Evidence. Amd. Aplt. Br. at 19. Defendant is at least partly correct. The evidence is prejudicial as almost all relevant evidence is, but it is not unfairly prejudicial, which is what the rules of evidence prohibit. *See* Utah R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."). Moreover, the evidence was clearly relevant because it provided a context for Anderson's relationship with defendant as well as a motive for the assault. Thus, any attempt to exclude this evidence would have been futile and counsel cannot be ineffective for not making futile objections. *See State v. Kelley,* 2000 UT 41, ¶26, 1 P.3d 546 ("[F]ailure to raise futile objections does not constitute ineffective assistance of counsel").

D. Trial Counsel Was Not Ineffective For Allegedly Not Properly Investigating and Exposing the Biases of Defendant's Victims.

Defendant claims that his trial attorney should have investigated and "expose[d] the biases" of Marcus Anderson and Antoinette Jones. Amd. Aplt. Br. at 19. However,

defendant never states how these witnesses are biased or what more defense counsel should have done to discover their alleged biases. Defendant alludes cryptically to "their prior associations with Mr. Moore," *id.*, but it is unclear how their acquaintance with defendant created bias. In fact, the opposite is true. Anderson testified that defendant was one of his drug dealers, that the two sometimes took drugs together and that defendant often "fronted" him drugs on credit. R. 350:162-63. Anderson stated that before defendant shot him, their relationship had been untroubled. R.350:161. Jones said she was friendly with defendant and that he was generally welcome in her home, although she acknowledged that she had occasionally asked defendant to leave. R. 350:97-98.

Because defendant has not identified what biases his trial counsel should have discovered, he has not demonstrated deficient performance or prejudice and his claim fails. *See Classon*, 935 P.2d at 532 (defendant must identify counsel's specific acts or omissions that "fall outside the wide range of professionally competent assistance"); *Penman*, 964 P.2d at 1162 ("'[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality'") (citation omitted) (brackets in original).

E. Defendant's Trial Counsel Was Not Ineffective In Not Withdrawing From the Case Earlier.

Despite this Court's order striking extra-record material from his brief, *see* Addendum D, defendant once again refers to the same extra-record material, albeit cryptically, in his amended brief. On page 13 of his amended brief, defendant claims in an argument heading that "Defense counsel was ineffective in not responding appropriately to Mr. Moore's requests for a substitution of counsel and for not notifying the Court." This is the same

heading defendant used at the beginning of Point II of his unredacted brief. *See* Aplt.'s Opening Brief at 14. Although defendant does not repeat the argument itself and notes that he is declining to do so "[i]n deference to this Court's Order striking extra-record information from Appellant's opening brief," the heading, too, is inappropriate because it refers to information outside the record. In the interest of expediency and moving the case along, the State will not renew its motion to strike. However, this reference to the extra-judicial material should be disregarded.

Moreover, the actual record does not support the claim that defendant's trial counsel should have withdrawn earlier. The record below contains only a single unequivocal indication that defendant became displeased with his attorney, and this did not occur until after his conviction. During sentencing, defendant had a terse exchange with the trial judge, who told defendant that his trial counsel "did a fine job in your defense—" Defendant cut him off and retorted: "Bullshit." R. 352:9. Defendant went on to say that his counsel "didn't do his job. That's what I'm telling you." R. 352:9-10. Following this outburst, trial counsel immediately filed a motion to withdraw, which was granted. R. 316-18. Thus, it is hard to see what defendant has to complain about. As soon as he voiced his dissatisfaction with his attorney, trial counsel withdrew and substitute counsel was appointed. R. 319.

The only earlier indication in the record that defendant wanted a different attorney was a letter he submitted to the court captioned "Plea for Withdraw[al] of Counsel and Evidentiary Hearing." R. 233-34. The letter, however, does not state that defendant was dissatisfied with his trial counsel, much less offer reasons for his alleged dissatisfaction.

Rather, the entire letter concerns defendant's contention that the State should not be allowed to present a medical report because the State "must have had access to this report" some time before the State first made the report available to defendant. R. 233. The letter says nothing to suggest a "conflict of interest, a complete breakdown in communication or an irreconcilable conflict which [led] to an unjust verdict." *State v. Lovell*, 1999 UT 40, ¶ 31m 947 P.2d 382, *cert. denied*, 528 U.S. 1083 (2000. Thus, defendant has not demonstrated that his attorney had any reason to withdraw from the case any earlier than he did. Accordingly, defendant's trial counsel was not ineffective for not withdrawing sooner.

Nor has defendant shown prejudice. Even assuming that defendant's counsel had some obligation to withdraw sooner, defendant has not identified errors that are reasonably probable to have altered the outcome of the trial. *See* sections I.A. through I.D, above. Thus, defendant's ineffective assistance of counsel claim fails.

II. THE TRIAL COURT TIMELY APPOINTED SUBSTITUTE COUNSEL AND DID NOT ERR IN NOT *SUA SPONTE* EXTENDING THE TIME TO FILE A MOTION FOR A NEW TRIAL.[5]

Defendant alleges that his due process rights were violated when the trial court "failed to timely appoint substitute counsel" and did not *sua sponte* grant additional time for defendant to file a motion for a new trial. Amd. Aplt. Br. at 10-18. Both claims are meritless.

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[5] This section responds to points I and III of appellant's amended brief.

As argued in section I.E, above, the trial court granted defendant's request for a new attorney within days after defendant made his displeasure known and counsel moved to withdraw. Defendant does not explain why or how the trial court should have or could have intuited his alleged desire for new counsel at any earlier date. Accordingly, this claim fails.

Defendant also claims that the trial court should have *sua sponte* granted additional time to file a motion for a new trial because his trial counsel withdrew and substitute counsel was not appointed until after the 10-day period following sentencing for filing a new trial motion. Amd. Aplt. Br. at 11. After sentencing, a defendant has 10 days to file a motion for a new trial "or within such further time as the court may fix during the ten-day period." Utah R. Crim. P. 24(c).

As discussed above, defendant told the trial court during his sentencing hearing that he was dissatisfied with his trial counsel's representation. R. 352:9-10. Following this outburst, trial counsel immediately filed a motion to withdraw, which was granted. R. 316-18. In the motion, trial counsel stated: "The defendant desires to file a motion for a new trial, based on ineffective assistance of counsel." R. 316 (Motion to Withdraw, dated January 3, 2005). The trial court granted the motion to withdraw on January 6, 2005, which, according to defendant, was the last day for filing a motion for a new trial. Amd. Aplt. Br. at 11. According to defendant, these circumstances created a "unique glitch" which caused the matter to "f[a]ll through the proverbial cracks" because trial counsel could not file a motion for a new trial raising his own ineffectiveness and substitute counsel was not appointed in time to file the motion. *Id.* at 10-11. Thus, according to defendant, the trial court should

have *sua sponte* extended the time and its failure to do so effectively precluded defendant from filing a motion for a new trial. *Id.* at 12.

In fact, the circumstances are not quite as Kafkaesque as defendant claims. The deadline for filing a motion for a new trial was not, as defendant asserts, January 6, 2005. Because the period for filing a new trial motion is less than 11 days, intermediate Saturdays, Sundays and holidays are excluded, which means the actual deadline was January 10. Thus, defendant did have a short window between the 6th and 10th of January when he or substitute counsel could have filed either a timely motion for a new trial or a motion to extend the time. Absent an actual motion for a new trial, and given that defendant had time after the court granted the motion to withdraw to file the motion, the trial court did not err in not *sue sponte* extending the deadline.

But even assuming *arguendo* that "a more prudent action"[6] would have been for the trial court to both grant the motion to withdraw and, at the same time, allow additional time to file the motion for a new trial, defendant's claim still fails because any error was harmless. *See State v. Wood*, 393 P.2d 381 (Utah 1964) (defendant bears burden to show prejudice when claiming separation of jurors during deliberation required new trial); *see also* Utah R. Crim. P. 24(a) ("The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a *substantial adverse effect* upon the rights of a party") (emphasis added); *State v. Boyd*, 2001 UT 30, ¶27,

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[6] Amd. Aplt. Br. at 12.

25 P.3d 985 (trial court has "broad discretion" to grant or deny timely motion for a new trial). Defendant claims a new trial motion would have been granted based on the ineffectiveness of his trial counsel. *See* Amd. Aplt. Br. at 13. But, as demonstrated in section I, above, defendant has not met and cannot meet his burden to demonstrate his counsel's performance was constitutionally deficient under *Strickland*. Because defendant cannot demonstrate his counsel was deficient, a motion for new trial based a claim of ineffective assistance of counsel would necessarily have been denied. Thus, even if it would have been more "prudent" for the trial court to extend the deadline, defendant suffered no prejudice and his claim must fail.

III. JURY INSTRUCTIONS WERE PROPER; DEFENDANT COMITTED BOTH AGGRAVATED BURGLARY AND AGGRAVATED ASSAULT.[7]

Defendant claims he was improperly convicted of aggravated burglary and aggravated assault because the assault was a lesser-included offense and should have merged into the burglary charge. Amd. Aplt. Br. at 20-21. Defendant is incorrect.

A. Defendant Agreed to the Jury Instructions He Now Challenges; Thus, Error, If Any, Was Invited and Cannot Be Challenged On Appeal.

Because defendant approved the instructions on the elements of aggravated burglary and aggravated assault, he cannot challenge them on appeal. "[A] party cannot take advantage of an error committed at trial when that party led the trial court into committing

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[7] This section responds to point V of Appellant's Brief.

the error." *State v. Anderson,* 929 P.2d 1107, 1109 (Utah 1996) (internal quotation and citation omitted). "Accordingly, a jury instruction may not be assigned as error even if such instruction constitutes manifest injustice 'if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction.'" *State v. Geukgeuzian*, 2004 UT 16, ¶ 9, 86 P.3d 742 (quoting *State v. Hamilton,* 2003 UT 22, ¶ 54, 70 P.3d 111).

In *Geukgeuzian*, the Utah Supreme Court reviewed its caselaw and enumerated several examples of invited error. *Id.* at ¶ 10. A defendant invites error when his counsel "confirm[s] on the record that the defense had no objection to the instructions given by the trial court." *Id.* (citing *Hamilton*, 2003 UT 22 at ¶ 55). A defendant also invites error where he fails to object to an instruction when asked specifically by the court. *Id.* (citing *Anderson*, 929 P.2d at 1108-09). Finally, a defendant invites error when his counsel represents to the court that she read the instruction and had no objection to it. *Id.* (citing *State v. Medina,* 738 P.2d 1021, 1023 (Utah 1987)).

Similarly, here, defendant invited the alleged error. At the beginning of the second day of trial, the court reviewed the instructions he intended to give to the jury with the State and defendant. R. 351:185-87. After reviewing the instructions, the court stated: "And that's it. Is that okay?" Defendant's counsel replied: "That sounds good." R. 351:187. Clearly, defense counsel "confirmed on the record that the defense had no objection to the instructions given by the trial court." *Geukgeuzian*, 2004 UT 16 at ¶ 10, (citing *Hamilton*,

2003 UT 22 at ¶ 55). Thus, any error was invited and defendant cannot challenge the instructions on appeal.

B. Defendant Was Properly Convicted Of Both Aggravated Burglary and Aggravated Robbery.

Even if this Court were to consider defendant's claim concerning the jury instructions, the claim still fails because defendant was properly convicted of both offenses.

In Utah, "[a] defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; . . ." Utah Code Ann. § 76-1-402(1) (West 2004). A defendant may be convicted of a charged offense or a lesser-included offense, but not both. Utah Code Ann. § 76-1-402(3) (West 2004). An offense is a lesser-included offense if "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged; . . ." Utah Code Ann. § 76-1-402(3)(a) (West 2004). If a defendant is convicted of both, the lesser charge merges into the greater. *State v. Ross*, 951 P.2d 236, 243 (Utah App. 1997)

The Utah Supreme Court has adopted a two-step analysis for determining whether offenses stand in a lesser-included relationship to each other for purposes of merger under Utah Code Ann. § 76-1-402(3). *State v. Brooks*, 908 P.2d 856, 861 (Utah 1995); *State v. Hill*, 674 P.2d 96, 97 (Utah 1983). "[T]he first step is a purely theoretical comparison of the statutory elements of each offense." *Brooks*, 908 P.2d at 861; *Hill*, 674 P.2d at 97. Some

criminal statutes, however, have multiple variations or elements, so that a greater-lesser relationship may exist between some variations of the crimes, but not of others. *Id.* In such a case, the court must look to the evidence presented at trial to determine what variation of the crime or crimes was proved and then "look[] to the statutory elements of the crime to determine whether it is an included offense." *State v. Finlayson*, 2000 UT 10, ¶16, 994 P.2d 1243; *accord Brooks*, 908 P.2d at 861-62; *Hill*, 674 P.2d at 97.

Applying the comparative elements test set out in *Finlayson* and *Brooks* compels the conclusion that although aggravated assault may be, under some circumstances, a lesser-included offense of aggravated burglary, the two crimes do not merge in this case. A person commits burglary if the actor "enters or remains unlawfully in a building . . . with intent to commit a felony or theft or commit an assault on any person." Utah Code Ann. § 76-6-202 (West 2004). A person commits aggravated burglary "if in attempting, committing, or fleeing from a burglary the actor or another participant in the crime . . . causes bodily injury to any person who is not a participant in the crime . . . [or] uses or threatens the immediate use of a dangerous weapon." Utah Code Ann. § 76-6-203(1)(a)-(b) (West 2004). A person commits aggravated assault if he commits assault and (a) intentionally causes serious bodily injury to another; or (b) uses a dangerous weapon or other means or force likely to produce death or serious bodily injury. Utah Code Ann. § 76-5-103(1)(c) (West 2004).

Defendant claims that under *State v. Bradley*, 752 P.2d 874 (Utah 1985), his offenses should merge. *Bradley* holds that where a defendant commits aggravated burglary by "'us[ing] or threaten[ing] the immediate use of a dangerous or deadly weapon against any

person who is not a participant in the crime' . . . aggravated assault is simultaneously proven." *Id.* at 878. Thus, defendant argues, because the State relied on his use or threatened immediate use of a dangerous weapon to establish aggravated burglary, the aggravated assault charge against him must merge and the trial court erred in giving jurors the option of convicting him of both charges. Amd. Aplt. Br. at 20-21.

Defendant misreads *Bradley*. In that case, the defendants were convicted of *third degree* aggravated assault, which is established through the use or threatened use of a dangerous weapon. *Id.* at 875; *see* Utah Code Ann. § 76-5-103(1)(b). Under those circumstances, the two crimes merged because the use or threatened use of a dangerous weapon was also an element of the aggravated burglary charge in that case. *Id.* Conversely, here, jurors convicted defendant of *second degree* aggravated assault because he "intentionally cause[d] serious bodily injury to another"—e.g., Marcus Anderson.[8] *See* Jury Instruction 32, R. 291, Addendum B. This element is not necessary to defendant's aggravated burglary conviction. Rather, jurors convicted defendant of aggravated burglary because in the course of burglarizing the home of Anderson and Ragsdale he either (1) inflicted "*bodily injury*[9] to any person *who was not a participant in the crime*" or (2) used or threatened the immediate use of a dangerous weapon against any person *who is not a*

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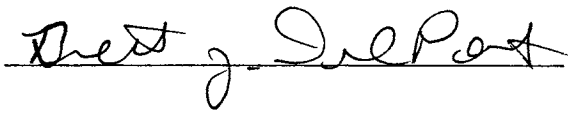
[8] "Serious bodily injury" is injury that "creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death." Utah Code Ann. § 76-1-601(10) (West 2004).

[9] "'Bodily injury means physical pain, illness, or any impairment of physical condition.'" Utah Code Ann. § 76-1-601(3) (West 2004).

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 2006 I caused to be U.S. Mail two copies of the foregoing to:

Ronald Fujino
356 East 900 South
Salt Lake City, Utah 84111



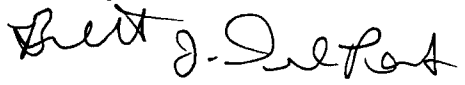
participant in the crime." Jury Instruction 26, R.285, Addendum B. Because the elements of aggravated burglary and aggravated assault applicable to the facts of this case are different, defendant was properly convicted of both crimes. Accordingly, defendant's claim that the trial court improperly instructed the jury fails.

CONCLUSION

For the foregoing reasons, this Court should affirm defendant's conviction.

RESPECTFULLY SUBMITTED this 3rd day of April, 2006.

MARK L. SHURTLEFF
Attorney General



BRETT J. DELPORTO
Assistant Attorney General

Addenda

Addendum A

Utah Code Ann. § 76-6-202. Burglary

(1) An actor is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit:

(a) a felony;

(b) theft;

(c) an assault on any person;

(d) lewdness, a violation of Subsection 76-9-702(1);

(e) sexual battery, a violation of Subsection 76-9-702(3);

(f) lewdness involving a child, in violation of Section 76-9-702.5; or

(g) voyeurism against a child under Subsection 76-9-702.7(2) or (5).

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

(3) A violation of this section is a separate offense from any of the offenses listed in Subsections (1)(a) through (g), and which may be committed by the actor while he is in the building.

Laws 1973, c. 196, § 76-6-202; Laws 2001, c. 359, § 1, eff. April 30, 2001; Laws 2001, 1st Sp.Sess., c. 4, § 2, eff. July 5, 2001; Laws 2003, c. 325, § 1, eff. May 5, 2003.

Utah Code Ann. § 76-6-203. Aggravated burglary

(1) A person is guilty of aggravated burglary if in attempting, committing, or fleeing from a burglary the actor or another participant in the crime:

(a) causes bodily injury to any person who is not a participant in the crime;

(b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; or

(c) possesses or attempts to use any explosive or dangerous weapon.

(2) Aggravated burglary is a first degree felony.

(3) As used in this section, "dangerous weapon" has the same definition as under Section 76-1-601.

Laws 1973, c. 196, § 76-6-203; Laws 1988, c. 174, § 1; Laws 1989, c. 170, § 6.

Utah Code Ann. § 76-5-103. Aggravated assault

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) A violation of Subsection (1)(a) is a second degree felony.

(3) A violation of Subsection (1)(b) is a third degree felony.

Laws 1973, c. 196, § 76-5-103; Laws 1974, c. 32, § 10; Laws 1989, c. 170, § 2; Laws 1995, c. 291, § 5, eff. May 1, 1995.

Utah Code Ann. § 76-1-402. Separate offenses arising out of single criminal episode-- Included offenses

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

Addendum B

INSTRUCTION NO. 32

Before you can convict the defendant, Calvin Leroy Moore, of the crime of Aggravated Assault, as charged in count II of the information, you must find from all of the evidence and beyond a reasonable doubt, each and every one of the following elements of that offense:

1. That on or about the 5th day of February, 2003, in Salt Lake County, State of Utah, the defendant, Calvin Leroy Moore, assaulted Marcus Anderson; and

2. That the said defendant intentionally or knowingly assaulted Marcus Anderson; and

3. That the said defendant then and there intentionally caused serious bodily injury to Marcus Anderson.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Assault as charged in count II of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count II.

Addendum C

INSTRUCTION NO. 26

Before you can convict the defendant, Calvin Leroy Moore, of the offense of Aggravated Burglary as charged in count I of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 5th day of February, 2003, in Salt Lake County, State of Utah, the defendant, Calvin Leroy Moore, entered or remained in the dwelling of Marcus Anderson and Antionette Ragsdale; and

2. That the defendant entered or remained unlawfully; and

3. That the defendant entered or remained intentionally or knowingly; and

4. That the defendant entered or remained with the intent to commit an assault on any person; and

5. That in attempting, committing or fleeing from a burglary, the defendant or another participant in the crime either:

(a) caused bodily injury to any person who was not a participant in the crime; or

(b) used or threatened the immediate use of a dangerous weapon against any person who is not a participant in the crime.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Burglary as charged in count I of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count I.

Addendum D

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	
	)	ORDER
Plaintiff and Appellee,	)	
	)	Case No. 20050072-CA
v.	)	
	)	
Calvin Moore,	)	
	)	
Defendant and Appellant.	)	

Before Judges Bench, Greenwood, and McHugh.

This matter is before the court on the Appellee's Motion to Strike Extra-Record Information from Appellant's Opening Brief.

IT IS HEREBY ORDERED that Appellee's motion is granted. Appellant is required to remove all references to documents not included in the record on appeal and resubmit an amended brief within fifteen days of the date of this order. Appellee shall file its amended brief within fifteen days of the date Appellant's amended brief is filed. Appellant shall file its reply brief within thirty days after Appellee files its amended brief.

DATED this 6 day of February, 2006.

FOR THE COURT:

Carolyn B McHugh

Carolyn B. McHugh, Judge

CERTIFICATE OF MAILING

I hereby certify that on February 6, 2006, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

BRETT J DELPORTO
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

RONALD S FUJINO
ATTORNEY AT LAW
356 E 900 S
SALT LAKE CITY UT 84111

Dated this February 6, 2006.

By _____
Deputy Clerk

Case No. 20050072
District Court No. 031900879